84-377

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ANDREW MICHAEL GLOMB,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANA P. BRIGHAM, Esq.
BRIGHAM & BRIGHAM
Counsel of Record
for Petitioner
Suite #100-East
1440 Kennedy Causeway
North Bay Village
Miami, Florida 33141
(305) 866-2293

26pp

QUESTION PRESENTED FOR REVIEW

Where a United States Court of Appeals exceeds its constitutional authority and jurisdictional powers under 18 U.S.C. §401(3) to punish, by dismissing an appeal on the ground that Petitioner has disobeyed or resisted a United States District Court Order to surrender his liberty, and the appeal contests the validity of a conditional United States District Court Order based solely upon poisoned evidence obtained by a per se constitutional violation, does the dismissal violate U.S. Const. Art. III, §1 or Petitioner's rights under U.S. Const. Amend. IV, V and VIII?

LIST OF ALL PARTIES

The undersigned counsel for Petitioner certifies that the following-listed persons have an interest in the outcome of this case:

ANDREW MICHAEL GLOMB
Petitioner

UNITED STATES OF AMERICA

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ANDREW MICHAEL GLOMB,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ANDREW MICHAEL GLOMB, the Petitioner herein, prays for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review an Order of that Court entered in the above-entitled case on June 20, 1984, which dismissed

his appeal as punishment for disobedience or resistance to a Court Order, contrary to the provisions of 18 U.S.C. §401(3) and otherwise, as set forth herein.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Fifth Circuit was dated and entered June 20, 1984. This Petition for a Writ of Certiorari was filed within sixty (60) days from the date of that Order.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Article III.

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The

Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Crimes and Criminal Procedure Title 18 U.S. Code §401:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as---

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Fed.R.Crim.P. 11(a)(2):

(2) **Conditional pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

STATEMENT OF THE CASE

On Saturday, September 10, 1983, a Federal Agent, using a shipping receipt previously obtained in a search incident to arrest at another place, searched for and seized a sealed package out of interstate commerce and away from the peaceful custody and control of a common carrier. There was no indication by plain view or otherwise that this package contained any

contraband or illegal matter, and the Federal Agent testified that he could have obtained a warrant but did not do so.

After the package was located and seized, it was opened and inside was discovered the evidence upon which the criminal charges against Petitioner ANDREW MICHAEL GLOMB were founded.

Petitioner GLOMB reached an agreement with the Federal District Court and the prosecution under the recent Fed.R. Crim.P. 11(a)(2) to make a conditional plea of guilty in exchange for Court approval and preservation of his appellate rights concerning the issue of whether or not the warrantless search and seizure was constitutional under U.S. Const. Amend IV.

Subsequent to the agreement under Fed.R.Crim.P. 11(a)(2), the Federal Dis-

trict Court denied bail pending appeal on the single ground that the Court-approved appeal was "without merit."

Petitioner GLOMB was then ordered to travel at his own expense and report to an institution to be designated within the following thirty (30) days, surrender his liberty and begin serving a twelve-year sentence.

Petitioner duly filed his Notice of Appeal, but at the appointed time and place failed to appear as ordered.

On May 8, 1984, Petitioner duly filed his Appellate Brief, demonstrating conclusively from the record that the warrantless search and seizure was contrary to law under the rule of Coolidge v. New Hampshire, 403 U.S. 443, on identical controlling facts, and was therefore a per se violation of U.S. Const. Amend. IV.

On May 16, 1984, the Government filed a Motion to Dismiss the appeal, which reads, excluding formal parts:

> COMES NOW the United States of America by and through James A. Rolfe, United States Attorney, Searcy L. Simpson, Jr., Assistant United States Attorney, and moves to dismiss the appeal of Andrew Michael Glomb on the ground that he has violated the conditions of his bond and failed to report to the designated institution as he was ordered to do by the trial court. Mr. Brigham, counsel for appellant, is aware of Mr. Glomb's status, and has no explanation for Glomb's failure to report. The United States considers him a fugitive from justice. See Molinaro v. New Jersey, 396 U.S. 365 (1970); and United States v. Davis, 625 F.2d 79 (5th Cir. 1980).

On May 25, 1984, Petitioner duly filed his Response to the Motion to Dismiss, raising objections under U.S. Const. Amend IV, V, VI and VIII.

On June 20, 1984, the United States Court of Appeals for the Fifth Circuit ruled simply:

> IT IS ORDERED that the motion of appellee to dismiss the appeal of appellant, Andrew Michael Glomb is GRANTED.

From that Order, Petitioner makes this his Petition for a Writ of Certiorari.

RULE 17(1) ARGUMENT

From Rogers v. Alabama, 192 U.S. 226, Petitioner learns that it is a necessary and well-settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights.

In Thomas v. Collins, 323 U.S. 516, this Honorable Court announced a duty

upon itself to say where the individual's freedom ends and Government's power begins, and that it is the character of the right to freedom, not of the limitation upon it, which determines what standard governs the choice.

Brady v. Maryland, 373 U.S. 83, teaches that Government should not be an architect of injustice, and quotes an inscription upon the walls of the Department of Justice as stating the proposition candidly for the Federal domain: "The United States wins its point whenever justice is done its citizens in the Courts."

In Petitioner's case, the Government has built an entire theater of events without a constitutional foundation based upon an illegal search and seizure and fruit of the poisoned tree resulting therefrom, even though the Prosecution

has a duty to correct illegal, false or poisoned evidence when it appears. (Mooney v. Holohan, 294 U.S. 103 and progeny)

The doctrine of Taylor v. Thomas, 89 U.S. 479, would consider constitutionally unlawful orders invalid and void. Thomas v. Collins, 323 U.S. 516, would permit Petitioner to stand on his right and be free from restraints on his liberty. U.S. v. Jackson, 390 U.S. 570, instructs that the exercise of constitutional rights should not suffer unnecessary or needless chilling effects.

The initial failure to obtain a warrant to search and seize, when one could and should have been obtained, was a fundamental error about which the Government knew or should have known at the time criminal charges were filed. All events proceeding therefrom have been fruit of the poisoned tree.

The results of the fruit of the poisoned tree have been that Petitioner has failed to surrender his liberty, but has become a man in exile without liberty, without a country, without constitutional rights, and with the judicially-approved doorway to appeal closed, contrary to an Act of Congress (18 U.S.C. §401(3)) all of which has a chilling effect upon the exercise of constitutional rights, privileges and immunities.

While this apparent conflict between the Government and its citizen is taking place, the judicial branch and the legislative branch of Government are also in conflict on the issue of punishment of a citizen who has disobeyed or resisted a lawful Court Order.

Where the judicial power exceeds its constitutional authority as defined by Congress and dismisses an appeal on the

ground that a lawful Court Order has been disobeyed or resisted prior to a final determination that that Court Order is lawful, a chilling effect takes place upon the exercise of constitutional rights and opens the door to the use of arbitrary and capricious unbridled judicial power, the end result of which would create a broad public disrespect for Government and the law itself.

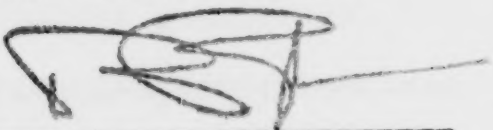
Petitioner should be allowed to test his constitutional position, as others in the past have. (Thomas v. Collins, supra.) Should the Order which he is charged with disobeying or resisting be fully determined in the Courts, Government will have performed its function; the United States will win its point, which is justice to citizens in the Courts; Petitioner will have been afforded a full measure of his constitutional

rights, and there will be no conflict within Government or between Government and its citizens to inspire folk ballads.

Respectfully submitted,

BRIGHAM & BRIGHAM
Suite 100-East
1440 Kennedy Causeway
North Bay Village
Miami, Florida 33141
(305) 866-2293

Counsel for Petitioner



By: _____
DANA P. BRIGHAM

PROOF OF SERVICE
CERTIFICATE BY BAR MEMBER

I HEREBY CERTIFY that I am a member of the Bar of the Supreme Court of the United States; that on Monday, the 20th day of August, 1984, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by depositing same in a U. S. Postal (office/~~mailbox~~) in a duly-addressed envelope with 1st-class postage prepaid upon: Hon. Rex E. Lee, Solicitor General of the U. S., Washington, D.C. 20543, and Searcy L. Simpson, Jr., Esq., Assistant U. S. Attorney, Room 16G28, 1100 Commerce, Dallas, Texas 75242.

DANA P. BRIGHAM

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ANDREW MICHAEL GLOMB,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANA P. BRIGHAM, Esq.
Counsel of Record
for Petitioner
BRIGHAM & BRIGHAM
Suite #100-East
1440 Kennedy Causeway
North Bay Village
Miami, Florida 33141
(305) 866-2293

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1071

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

PHILIP JAY LEVINE,
GREGORY BROWN EMRICK and
ANDREW MCHAEL GLOMB,

Defendants-Appellants.

Appeal from the
United States District Court
for the Northern District of Texas

Before REAVLEY, RANDALL and JOHNSON, Circuit Judges.

B Y T H E C O U R T:

IT IS ORDERED that the motion of appellee( ) to dismiss the appeal of appellant, Andrew Michael Glomb, is GRANTED.

IT IS FURTHER ORDERED that the motions of appellants, Gregory Brown Emrick and Phlip Jay Levine to dismiss their appeals is GRANTED.

MOT-6A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1071

ANDREW MICHAEL GLOMB,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

MOTION TO DISMISS APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the United States of America by and through James A. Rolfe, United States Attorney, Searcy L. Simpson, Jr., Assistant United States Attorney, and moves to dismiss the appeal of Andrew Michael Glomb on the ground that he has violated the conditions of his bond and failed to report to the designated institution as he was ordered to do by the trial court. Mr. Brigham, counsel for

appellant, is aware of Mr. Glomb's status, and has no explanation for Glomb's failure to report. The United States considers him a fugitive from justice. See Molinaro v. New Jersey, 396 U.S. 365 (1970; and United States v. Davis, 625 F.2d 79 (5th Cir. 1980).

Respectfully submitted,

JAMES A. ROLFE
United States Attorney
/s/
SEARCY L. SIMPSON, JR.
Assistant United States Attorney
1100 Commerce, Room 16G28
Dallas, Texas 75242
(214) 767-0951

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on Mr. Dana P. Brigham, BRIGHAM & BRIGHAM, Suite 100-East, 1440 Kennedy Causeway, North Bay Village, Miami, Florida 33141, by placing the same in the United States mail this 16th day of May, 1984.

/s/
SEARCY L. SIMPSON, JR.
Assistant United States Attorney